What's Wrong with *Gideon*

Tracey L. Meares†

Gideon v Wainwright[1] is an icon of criminal procedure. The case, decided in 1963, established the constitutional right of indigent felony defendants to have counsel appointed to represent them in state criminal courts.[2] To many, the Court's conclusion in *Gideon* was a long-awaited and obvious one. Indeed, Robert F. Kennedy, then Attorney General, speaking at The Law School on Law Day a year after *Gideon* was decided, wondered whether lawyers even needed a constitutional determination to spell out appropriate professional responsibilities for representing indigent defendants.[3]

Given its status, then, one might find it somewhat surprising that I take issue with the case. I have set this task for myself, but I must be clear about what I perceive to be the problem with *Gideon*. I have no quarrel with *Gideon*'s conclusion establishing the constitutional right of indigent defendants to appointed representation. That principle is, of course, why *Gideon* is famous. What I find problematic about *Gideon* is the basis of the Court's opinion. *Gideon*, I believe, represents a break with a kind of constitutional decisionmaking in the criminal procedure area—a break that has negative consequences. Specifically, *Gideon* marks the beginning of a shift in the Court's articulation of the requirements of fair trials away from notions of fundamental fairness in the Due Process Clause and toward reference to the Bill of Rights via the process of incorporation.

The effect of this shift is subtle but significant. Throughout the early due process cases comprising the infancy of constitutional criminal procedure, the Court demonstrated not only an interest in securing accurate determinations of guilt for state criminal defendants, but also an obvious concern about the relationship between the structure of

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† Professor of Law and Director of the Center for Studies in Criminal Justice, The University of Chicago; Research Fellow, American Bar Foundation. Thanks go to Emily Buss, Paul Garcia, and Dennis Hutchinson for comments; Michele Landis and Adrian Vermeule for helpful conversations; and to Kelsi Brown Corkran for research assistance. The Arnold and Frieda Shure Research Fund and the American Bar Foundation provided financial support.

1 372 US 335 (1963).

2 Id at 344 ("The right of one charged with crime to counsel . . . [is] fundamental. . . . This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

3 See Robert F. Kennedy, *Law Day Address*, 13 U Chi L Sch Rec 24, 25 (1965) ("Should there ever have been a need for the *Gideon* decision? Did we need a Constitutional determination to tell us our professional responsibilities?").

criminal courts and the social and political legitimacy of American democracy. In short, the Court's jurisprudence in the early years reflected a remarkably consistent preoccupation with non-instrumental values concerning the public aspects of justice. While such public-regarding aspects of justice have not been disregarded as irrelevant to criminal procedure decisions following *Gideon*, they occupy a much less pronounced role. Instead, the later decisions reflect the impact of a jurisprudence that focuses its attention on the individual offender and his relationship to the Bill of Rights, often to the exclusion of the public's perception of the fairness of the criminal justice system's operation.[4]

I do not mean to make the grand argument that the Supreme Court, by moving away from a constitutional criminal procedure based on ideas of fundamental fairness in the Due Process Clause and toward incorporation, has created an illegitimate criminal justice system. I do mean to argue that there are costs to the change. One upshot of the shift is a jurisprudence that has little room for a discussion of issues that are important to the promotion of public confidence in the criminal justice system. This is unhealthy for the body politic. Diminished public support for the criminal justice system, taken to the extreme, can lead to diminished respect for the law and, thereby, less compliance with the law.[5] Another cost of the change is that by looking away from flexible, forward-looking notions of fundamental fairness, the Court has hampered its ability to respond to important changes in the criminal justice system and the social and political shifts that have attended these changes. This inflexibility, at the end of the day, has affected the Court's ability to articulate whether criminal process is truly fair—which is, after all, the basic question of constitutional criminal procedure.[6]

A full treatment of this argument obviously extends beyond *Gideon* and the right to counsel. However, to illustrate the argument succinctly, in this Essay I focus on the relationship between the right to counsel as articulated in *Gideon* and the right to proceed pro se established by *Faretta v California*.[7] Recent opinions indicate that self-

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4 For an illustration of this phenomenon consider the discussion of *Faretta v California*, 422 US 806 (1975), below.

5 See Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 Or L Rev 391, 398 (2000) ("Social psychologists . . . have connected voluntary compliance with the law to the fact that individuals believe the law is 'just' or because they believe that the authority enforcing the law has the right to do so.").

6 Professor Buss argues that the Court has been similarly inflexible in its approach to the due process rights of children, undermining the goals of the juvenile justice system. See generally Emily Buss, *The Missed Opportunity in* Gault, 70 U Chi L Rev 39 (2002).

7 422 US 806, 836 (1975) ("[F]orcing [the defendant] . . . to accept against his will a state-appointed public defender . . . deprived him of his constitutional right to conduct his own

representation is a site at which the clash between constitutional values directed at fundamental fairness and those directed at individual autonomy is highly contested.[8] It is, therefore, an ideal example of the potential conflict between a criminal procedure based on broader notions of fundamental fairness and a procedure that has a more individual rights-focused foundation. The consequences of the path chosen in *Gideon* can be seen by comparing *Faretta* to *Gideon* and asking the following questions: Would the outcome in *Faretta* have been the same if the Court had consistenly pursued a constitutional criminal procedure based on fundamental fairness after *Gideon*? Would a different outcome in *Faretta* have served as a signal of a constitutional criminal procedure more fully focused on the production of fairness?

I. DUE PROCESS AND FUNDAMENTAL FAIRNESS: A LITTLE HISTORY AND CONTEXT

One hundred years ago, constitutional criminal procedure was an unknown field of law. Although the Bill of Rights, on which much of modern constitutional criminal procedure is based, mentions rules specifically relevant to criminal trials such as the Sixth Amendment's right to trial by jury and the Eighth Amendment's proscription against cruel and unusual punishment, the Supreme Court decided early on that the Bill of Rights applied only to the federal government,[9] which prosecuted offenders very rarely.[10] Until 1884, when *Hurtado v California*[11] was decided, the Supreme Court never reviewed state criminal cases.

Hurtado was charged in an information with first-degree murder. He was convicted, and he argued before the Supreme Court that the failure to charge him with a grand jury indictment violated the Four-

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defense.").

8 See, for example, *Martinez v Court of Appeal of California*, 528 US 152, 164 (2000) (holding that the Sixth Amendment does not guarantee the right to represent oneself on appeal); *United States v Farhad*, 190 F3d 1097, 1099–1101 (9th Cir 1999) (declining to reconsider *Faretta* and discussing the requirements for a valid waiver of right to counsel); *United States v Farhad*, 190 F3d 1097, 1107 (9th Cir 1999) (Reinhardt specially concurring) (noting that the right of self-representation "frequently, though not always, conflicts squarely and inherently with the right to a fair trial"); *Silagy v Peters*, 905 F2d 986, 1006–08 (7th Cir 1990) (holding that the right to proceed pro se recognized in *Faretta* applies to the sentencing phase of a capital case); *United States v Davis*, 150 F Supp 2d 918, 919 (ED La 2001) (holding that a defendant "does not have a constitutional right to self-representation at the penalty phase of [a] capital case").

9 See *Barron v Mayor of Baltimore*, 32 US (7 Pet) 243, 250 (1833) (stating that the amendments comprising the Bill of Rights "contain no expression indicating an intention to apply them to the state governments").

10 See Margaret Werner Cahalan, *Historical Corrections Statistics in the United States, 1850–1984* 151 (DOJ 1986) (stating that before the first federal criminal code was adopted in 1909, federal criminal laws dealt with a limited number of crimes).

11 110 US 516, 538 (1884) (holding that the Due Process Clause does not require the application of the Fifth Amendment grand jury requirement to the states).

teenth Amendment's Due Process Clause. The Supreme Court disagreed, but nonetheless engaged in an extended discussion of what due process means for criminal procedure. The justices did not decide on a single rationale, but importantly did decide that historical practice was not the only means of determining whether a procedure constituted due process of law, as earlier cases had suggested.[12] The Court reasoned,

> [T]o hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.
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> . . .
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> On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.[13]

After *Hurtado*, the Court began to place some constitutional limits on criminal process in state cases, and the vehicle for these limits was the Due Process Clause of the Fourteenth Amendment.

In the two decades that followed *Hurtado*, the Supreme Court did very little to disturb the constitutional rules governing state criminal trials. The early cases in which the Court did overturn state convictions concerned race discrimination in jury selection.[14] Beginning in the late 1920s and continuing throughout the 1930s, however, the Court began to utilize the Due Process Clause of the Fourteenth Amendment to invalidate state criminal convictions. For example, in *Tumey v Ohio*,[15] decided in 1927, the Court invalidated the conviction of a defendant accused of violating the state's Prohibition Act. The trial had been presided over by a mayor who was paid for his services

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12 See, for example, *Murray's Lessee v Hoboken Land & Improvement Co*, 59 US (18 How) 272, 277 (1855) (formulating principles for determining due process grounded in legal historical research).

13 *Hurtado*, 110 US at 529, 531. Note that *Hurtado* appears to suggest that progress in due process jurisprudence moves in the direction of fewer rather than a greater number of procedural protections. See id at 532 ("Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power."). Just after the turn of the century, the Court corrected itself and made clear that the meaning of the clause "should be gradually ascertained by the process of *inclusion and exclusion* in the course of the decisions of cases as they arise." *Twining v New Jersey*, 211 US 78, 100 (1908) (emphasis added).

14 See, for example, *Rogers v Alabama*, 192 US 226, 231 (1904) (invalidating the exclusion of "persons of the African race" from a grand jury "in the criminal prosecution of a person of the African race" on the basis of their race as a violation of the Fourteenth Amendment), quoting *Carter v Texas*, 177 US 442, 447 (1900).

15 273 US 510 (1927).

only when he chose to convict.[16] In *Powell v Alabama*,[17] decided in 1932, the Court found, after reviewing the entire record of the case against two African-American defendants, that factors such as "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility," the nature of the crime with which they were charged (the gang rape of two white girls), the inflamed sentiment of the community, and the failure of the court to appoint counsel, resulted in an unfair trial.[18] And in *Brown v Mississippi*,[19] decided in 1936, the Supreme Court invalidated the defendant's conviction by a Mississippi court because the conviction rested almost entirely on a confession extracted through torture.[20]

In each of these cases the Court made clear that it regarded public perceptions of the fairness of judicial proceedings as serving a critical function in establishing the constitutional standards for due process in a criminal trial. For example, the Court found irrelevant in *Tumey* that the evidence demonstrated quite clearly that the defendant was guilty of the charge against him; he was nonetheless entitled, the Court concluded, to an impartial judge in order to satisfy the requirements of due process.[21] An independent adjudicator clearly advances a perception of fairness, even when accuracy is not served in the individual case.[22] In *Brown*, the incredible level of physical coercion detailed by the Court makes concern about the accuracy of the confessions in the case unavoidable. Still, concern for public-regarding justice is evident in the opinion—a point soon made clearer in later cases.[23] Similarly in *Powell*, the Court held that Alabama was required to appoint counsel for the defendants because the right to a lawyer was a "fundamental principle[] of liberty and justice which lie[s] at the base of all our civil and political institutions."[24] The Court went on to

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16 See id at 532 ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant . . . denies the latter due process of law.").

17 287 US 45 (1932).

18 Id at 71.

19 297 US 278 (1936).

20 See id at 284, 287. The deputy sheriff who received Brown's confession admitted at trial to beating the defendant. The sheriff defended his actions on the ground that the horrific beatings were "[n]ot too much for a negro." Id at 284.

21 See *Tumey*, 273 US at 535.

22 See Martin H. Redish and Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L J 455, 483–84 (1986) (evaluating non-instrumental values served by due process and proposing that the appearance-of-fairness value demands a truly independent adjudicator).

23 See, for example, *Watts v Indiana*, 338 US 49, 50 n 2 (1949), citing *Lisenba v California*, 314 US 219, 236–37 (1941), for the proposition that "a coerced confession is inadmissible under the Due Process Clause even though statements in it may be independently established as true."

24 *Powell*, 287 US at 67, quoting *Hebert v Louisiana*, 272 US 312, 316 (1926). The same language was subsequently quoted in *Brown*, 297 US at 286.

hold that the "ends of public justice" required the trial court to appoint counsel for the defendants, "[h]owever guilty."[25] Thus, while an accurate determination of guilt clearly constituted an aspect of fair treatment for the defendants in these cases, that important instrumental goal was not the only goal to be served by due process. The criminal defendant was not the only relevant stakeholder in determining whether a trial was "fair." Indeed, the Court in these early cases clearly deemed that the public, as well as criminal defendants, has an obvious interest in the fundamental fairness of the criminal justice system.

Ideas about what I call a public-regarding notion of due process found their greatest proponents in Justices Cardozo and Frankfurter as the Court began to take constitutional criminal procedure more seriously. In various opinions, Justice Cardozo wrote compellingly about a public-regarding due process. He noted that the employment of a procedure is inconsistent with due process when its use violates "a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental,"[26] and when the procedure subjects a person to "a hardship so acute and shocking that our polity will not endure it."[27] Similarly, Justice Frankfurter in later cases noted that due process includes procedures required for the "protection of ultimate decency in a civilized society,"[28] and "a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."[29] This heady and inspiring language helped to form the basis of modern criminal procedure.

The rhetoric of fundamental fairness is not amenable to fixed rules. In fact, the flexibility of due process determinations of the early constitutional criminal procedural era was its hallmark. One concern, however, was whether the strength of a flexible doctrine that had produced such celebrated cases as *Powell* and *Brown* was also a weakness. While the values articulated in the opinions were weighty, the actual regulation of state criminal procedure was quite light.[30] The due process standards developed by the Court typically specified a case-by-case review rather than prophylactic rules. And while a public-

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25 *Powell*, 287 US at 72, 52.

26 *Snyder v Massachusetts*, 291 US 97, 105 (1934).

27 *Palko v Connecticut*, 302 US 319, 328 (1937).

28 *Adamson v California*, 332 US 46, 61 (1947) (Frankfurter concurring).

29 *Solesbee v Balkcom*, 339 US 9, 16 (1950) (Frankfurter dissenting).

30 Heavier regulation was inconsistent with the Court's tradition of not second-guessing juries—especially in state cases. Moreover, in many state cases review was precluded by procedural default. See Dennis J. Hutchinson, *A Century of Social Reform: The Judicial Role*, 4 Green Bag 2d 157, 163 (2001) (stating that in the 1930s, frequent, "ugly accounts of southern justice . . . [were] precluded from review by procedural default, inept counsel or no counsel at all").

regarding notion of justice clearly is one aspect of the fundamental fairness approach to due process interpretation, the early due process cases pursued other goals such that identifying a systematic interpretation of due process from the cases is not an easy task.[31] Some critics even claimed that the flexible fundamental fairness approach was simply another name for the personal predilections of individual justices. Justice Black was the foremost proponent of this argument in the nascent criminal procedure due process era.[32] Justice Black was the author of *Gideon*.

II. *GIDEON* AND THE INCORPORATION TURN

Prior to *Gideon*, *Powell v Alabama* dictated that the state must provide defendants in criminal cases with counsel at trial only when fundamental fairness required it.[33] In a series of cases following *Powell*, the Court developed a "special circumstances" rule in order to decide whether appointment of counsel was necessary. In each of these cases, the Court explained why counsel was necessary in that particular case to promote fundamental fairness.[34] However, in 1963, the Court broke once and for all with the special circumstances approach and held that

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31 See Ronald Jay Allen, et al, *Comprehensive Criminal Procedure* 78–87 (Aspen 2001) (identifying various strands of the meaning of due process in criminal cases—due process as the rule of law, the Bill of Rights, accuracy, and fundamental fairness—and claiming that "none of the four views seems to have much to do with any of the others"); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L J 319, 319–20 (1957) (pointing to the "chaotic array" in the Court's due process requirements).

32 See, for example, *Rochin v California*, 342 US 165, 175 (1952) (Black concurring) (noting the majority's insistence that their definition of fairness "do[es] not refer to their own consciences or to their senses of justice and decency"); *Adamson*, 332 US at 92 (Black dissenting) (describing judges employing the fundamental fairness approach as "roam[ing] at will in the limitless area of their own beliefs as to reasonableness"), quoting *Federal Power Commission v Natural Gas Pipeline Co*, 315 US 575, 601 n 4 (1942). Consider Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 Stan L Rev 5 (1949) (discussing the history of the Fourteenth Amendment and taking issue with Justice Black's arguments for incorporation).

33 See *Powell*, 287 US at 71:

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

34 See, for example, *Chewning v Cunningham*, 368 US 443, 447 (1962) (finding a right to counsel in a habitual offender proceeding because of the seriousness of the charge, the complexity of the issues, and the high possibility of prejudice resulting from lack of counsel); *Hudson v North Carolina*, 363 US 697, 703 (1960) (describing in detail how lack of counsel prejudiced the petitioner, and concluding that "the circumstances . . . made this a case where the denial of counsel's assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment"); *Williams v Kaiser*, 323 US 471, 474–76 (1945) (explaining that the complexity of the charges and defenses made the provision of counsel a matter of fundamental fairness).

the Sixth Amendment's guarantee of counsel for all indigent defendants is a fundamental right "made obligatory upon the States by the Fourteenth Amendment."[35]

To reach this conclusion in *Gideon*, the Court overruled an earlier case, *Betts v Brady*.[36] *Betts* was similar to *Gideon* in that the petitioner was a noncapital felony defendant who sought to have counsel appointed under the special circumstances rule.[37] Given that Betts had been tried before a judge rather than a jury and that the case presented no complicated issues, the Court declined to find a violation of fundamental fairness.[38] Justice Black dissented and argued that the Fourteenth Amendment automatically made the Sixth Amendment applicable to the states.[39] His argument appears straightforward: Since the Court had already interpreted the Sixth Amendment to require the appointment of counsel for indigent felony defendants in federal cases, then Betts must also have counsel provided.[40]

Black lost the battle in *Betts*, but he won the war in *Gideon*. In doing, so he subtly shifted the basis for interpretation of the requirements of a fair trial. It is true that the *Gideon* Court's opinion includes language consistent with the fundamental fairness approach.[41] However, instead of determining whether the right to counsel was "implicit in the concept of ordered liberty,"[42] Justice Black's inquiry focused on whether "a *provision in the Bill of Rights* which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment."[43] Under this view, the *Betts* opinion was wrong in failing to conclude that the Sixth Amendment was one of those rights.

What is the consequence of this approach? Whether the decision is justified under the Sixth Amendment as applied to the states through the Fourteenth Amendment or as an interpretation of the Due Process Clause under notions of fundamental fairness, Gideon still gets a lawyer appointed to represent him at trial. Justice Harlan, who vociferously argued against incorporation in *Gideon* (and in other cases), still concurred in *Gideon*.[44] It seems likely that *Gideon*'s

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35 *Gideon*, 372 US at 342.

36 316 US 455 (1942).

37 See id at 457.

38 See id at 472–73.

39 See id at 474 (Black dissenting).

40 See id.

41 "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 US at 344.

42 *Palko v Connecticut*, 302 US 319, 325 (1937).

43 *Gideon*, 372 US at 342 (emphasis added), quoting *Betts*, 316 US at 465.

44 See 372 US at 351–52 (Harlan concurring) (arguing the "special circumstances" rule should be abandoned and that fundamental fairness considerations, not the Sixth Amendment,

outcome was inevitable, no matter the constitutional basis.[45]

There are at least two problems that arise from the approach taken in *Gideon*. First, a constitutional criminal procedure grounded in the Bill of Rights rather than fundamental fairness risks inflexibility. Although the *Gideon* Court incorporated the basic principle of the Sixth Amendment to the states, the Court also began a practice extended in later cases of applying the provision to the states in the same way the provision was interpreted in federal criminal cases.[46] This approach does not take into account the real differences between the federal and state systems and fails to account for "growth and vitality, for adaptation to shifting necessities, for wide differences of reasonable convenience in method."[47] Second, although in *Gideon* the Court tied incorporation of the right to counsel to an articulation of values of fundamental fairness, a review of constitutional criminal procedure decisions in the mid- to late 1970s reveals that the Court abandoned the process of identifying fundamental values served by incorporating criminal procedure-oriented rights to the states in favor of a more

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dictate a right to counsel in all cases where there is a "possibility of a substantial prison sentence").

45 Indeed, by the time *Gideon* was decided, the Supreme Court was willing to find a special circumstance requiring the appointment of counsel in every case it heard where the issue was raised. See David A. Strauss, *The Common Law Genius of the Warren Court*, Public Law and Legal Theory Working Paper No 25 at 26 (May 2002), online at http://www.law.uchicago.edu/academics/publiclaw/resources/25.strauss.warren.pdf (visited Jan 25, 2003) ("[F]rom 1950 on, the Court, still applying *Betts*, reversed in every right to counsel case that came before it."). See also *Chewning*, 368 US at 447 (noting "*potential prejudice* resulting from the absence of counsel so great [in the case] that the rule [the Court has] followed concerning the appointment of counsel in other types of criminal trials is equally applicable here") (emphasis added). A potential prejudice standard will almost always be met by suggesting a prophylactic rule—a fact about which Justice Harlan complained:

> To me, the bare possibility that any of these improbable claims could have been asserted does not amount to the 'exceptional circumstances' which, under existing law, *e.g.*, *Betts v Brady*, 316 US 455, must be present before the Fourteenth Amendment imposes on the State a duty to provide counsel for an indigent accused in a noncapital case.

Oyler v Boles, 368 US 448, 459 (1962) (Harlan concurring).

46 See, for example, *Duncan v Louisiana*, 391 US 145, 157–58 (1968) ("[I]n the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right."); *Miranda v Arizona*, 384 US 436, 463–64 (1966) (holding that considerations surrounding the application of the Self-Incrimination Clause in federal courts were also applicable to the states). See also George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich L Rev 145, 150–51 (2001) (arguing that the Court's method of applying Bill of Rights provisions to the states and to the federal government in equal measure has resulted in an unnecessarily cramped interpretation of rights applicable to defendants in *federal* criminal cases).

47 Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal L Rev 929, 954 (1965), quoting Felix Frankfurter, *The Supreme Court Writes a Chapter on Man's Rights*, in Archibald MacLeish and E.F. Prichard, Jr., eds, *Law and Politics: Occasional Papers of Felix Frankfurter 1913–1938* 189, 192–93 (Harcourt, Brace 1939).

formalistic and often historical interpretive approach. The failure to work out the values of fundamental fairness that attend the creation of constitutional criminal procedure risks a jurisprudence that diverges from the goal of determining what is fair in criminal justice—especially a vision of fairness that is public-regarding.

I should point out here that the Supreme Court did not completely abandon fundamental fairness analysis in constitutional criminal procedure in the modern era. For example, in *Brady v Maryland*,[48] the Court ruled that the prosecutors must turn over to the defendant evidence favorable to an accused upon request where the evidence is material either to guilt or to punishment because "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[49] *In re Winship*[50] established the requirement of proof beyond a reasonable doubt as a function of fundamental fairness in criminal cases.[51] Later, in *Chambers v Mississippi*,[52] the Court concluded that a black man charged with shooting a white police officer was subjected to state evidentiary rules that rendered his trial unfair and deprived him of due process of law.[53] The Court concluded "simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial."[54] More recently, in *Ake v Oklahoma*,[55] the Court held that a state court's refusal to provide an indigent, mentally impaired defendant with access to a psychiatrist as a consultant to the defense team resulted in an unfair trial.[56] As in *Chambers*, the *Ake* Court reviewed the entire proceeding and then determined that under the circumstances fundamental fairness required that the defendant have a psychiatrist so that he had "a fair opportunity to present his defense."[57]

These and other cases make it clear that the Sixth Amendment does not by itself delimit the terms of a fair trial; the Court remains

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48 373 US 83 (1963).

49 Id at 87.

50 397 US 358 (1970).

51 See id at 363–64.

52 410 US 284 (1973).

53 See id at 302. ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

54 Id at 303.

55 470 US 68 (1985).

56 See id at 74:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

57 Id at 76.

committed to the individualized review of cases for "fundamental fairness" under the Due Process Clause of the Fourteenth Amendment. Nonetheless, the Due Process Clause is, for the most part, a sideshow. The Bill of Rights is the main attraction.

III. *FARETTA* AND *GIDEON*: A CLASH THAT ILLUSTRATES THE PROBLEM

Faretta v California, the case that establishes the right of criminal defendants to represent themselves at trial, is a prime example of the costs of the foundational shift in *Gideon*. *Faretta* was decided just over ten years after *Gideon*. The *Faretta* Court, in a 6-3 decision, held that the defendant's interest in autonomy required that he be allowed to waive his right to a lawyer and represent himself at trial. The Court located this fundamental right to self-representation in the structure and history of the Sixth Amendment, independent of the defendant's power to waive the right to assistance of counsel.[58] The tension the *Faretta* holding creates with *Gideon* and public-regarding notions of fundamental fairness is clearly illustrated by comparing the following two excerpts from the majority and dissenting opinions. Writing for the majority, Justice Stewart stated:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. *For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.*[59]

The Court nevertheless concluded that the defendant's right to be free from state compulsion to accept a lawyer he didn't want won out over the conclusion to which the weight of precedent pointed. Chief Justice Burger and Justice Blackmun in separate dissents argued vigorously that pro se trials would lack the elements of fundamental fairness, including the public-regarding aspects. According to Chief Justice Burger, the goal of ensuring justice, "in the broadest sense of that term," is

> ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to

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58 "We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel. On the contrary, the right must be independently found in the structure and history of the constitutional text." 422 US at 819–20 n 15 (citation omitted).

59 Id at 832–33 (emphasis added) (citation omitted).

> the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the "freedom" "to go to jail under his own banner."[60]

While it is certainly possible that a constitutional criminal procedure based on fundamental fairness rather than on an interpretation of the Bill of Rights, and specifically the Sixth Amendment, could have produced the identical outcome of *Faretta*, the *Faretta* majority's job would have been more difficult. The majority would have had to conclude that not allowing the defendant to represent himself would result in an unfair trial—a trial that offended the concept of ordered liberty. In so concluding, the Court would find that Faretta's interest in presenting his own case to his peers[61]—an autonomy interest that could be grounded in due process[62]—outweighed other values protected by a due process analysis aimed at producing fundamental fairness, such as insuring the accuracy of the guilt determination at trial and promoting the appearance of fairness of the process to the public. In a case preceding *Faretta*, the California Supreme Court struggled through precisely this analysis and ultimately concluded that the right to self-representation is not automatically fundamental to a fair trial, although the court did suggest it was possible for a defendant to be prejudiced by the state's failure to allow him to proceed pro se and thus be a victim of a constitutionally unfair trial.[63] In contrast, the *Faretta* Court's analysis was centered on a historical reading of the Sixth Amendment with no reference to due process values—an analysis that was deemed flimsy at the time by the dissenters[64] and that appears to be considered unconvincing by a majority of the Court today.[65]

This discussion of *Faretta* illustrates the two problems with the foundational shift I identified above. First, the *Faretta* analysis,

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60 Id at 839–40 (Burger dissenting), quoting *Maldonado v Denno*, 348 F2d 12, 15 (2d Cir 1965).

61 See 422 US at 834.

62 See Kadish, 66 Yale L J at 347 (cited in note 31) (describing ensuring respect for the dignity of the individual as an objective of due process adjudication).

63 See *People v Sharp*, 7 Cal 3d 448, 499 P2d 489, 496–98 (1972) ("[N]either the federal nor the California Constitution makes specific provision for self-representation as a constitutionally protected right in criminal trials.... [H]owever ... due process considerations may require that a defendant be accorded the right of self-representation.").

64 See 422 US at 837 (Burger dissenting) ("[The Court's] ultimate assertion that such a right is tucked between the lines of the Sixth Amendment is contradicted by the Amendment's language and its consistent judicial interpretation."); id at 847 (Blackmun dissenting) ("Where then in the Sixth Amendment does one find this right to self-representation?").

65 See *Martinez v Court of Appeal of California*, 528 US 152, 159–63 (2000) (deciding that there is no constitutional right to self-representation on direct appeal from a criminal conviction and casting aspersions on *Faretta* in the process).

grounded in the Sixth Amendment, is both prophylactic and static. It applies to all defendants who seek to represent themselves without regard to the particular circumstances of their cases. And because the interpretation of the Sixth Amendment is grounded in English history, which presumably does not change, there is no reason to expect that this analysis will change with innovations in the criminal adversarial process as they occur. Second, the Sixth Amendment analysis in *Faretta* pays no attention to the development of a theory of fundamental fairness as it applies to criminal cases. In particular, it completely ignores how self-representation in criminal trials will affect the public who views such cases—whether that public is the jury in the case or the wider public watching the case on TV[66]—and thus risks undermining public confidence in the criminal justice system.

IV. FURTHER PROBLEMS WITH THE BILL OF RIGHTS AS A CODE OF CRIMINAL PROCEDURE[67]

While I have demonstrated in a particular case why the failure to make due process analysis primary can lead to negative consequences with respect to the interpretation of the constitutional right to a fair trial, the *Faretta* problem is not unique in criminal procedure. Constitutional criminal procedure suffers in other areas as well. Police practices can and historically have been conceived in terms of fundamental fairness. Today, constitutional regulation of police practices is focused upon the Fourth and Fifth Amendments to the Constitution. The Court has generated opinions establishing important rights and attendant rules that protect criminal defendants under the Fourth and Fifth Amendments. Yet, as I show below, some scholars have argued that the "code" the Court has established is deficient in some respects. I believe that part of the blame lies in the failure to consider how the code establishes fundamental fairness in the criminal justice system as it pertains to police practices.

For example, Donald Dripps has shown[68] that some abusive police practices are simply beyond the purview of constitutional review be-

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66 Consider the following media accounts of the 1995 murder trial of Colin Ferguson, who unsuccessfully defended himself against charges that he shot several train commuters: Stanley S. Arkin and Katherine E. Hargrove, *Justice Mocked When Madman Defends Himself*, LA Times M1 (Feb 12, 1995) ("We are struck by a feeling of hopelessness—or at least uneasiness—due to the substitution of this lunacy for what should be a sober, reflective and thoughtful process."); Sylvia Adcock, *Playing to Packed House*, Newsday A07 (Feb 10, 1995) ("It's a farce, an unnecessary farce. We're just the ones paying for all this.") (quoting one court spectator).

67 Here I am taking liberty with the title of Judge Friendly's very important piece in this area. See Friendly, 53 Cal L Rev 929 (cited in note 47).

68 See Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U Ill L Rev 261, 262–64 (arguing that Fourth Amendment terms do not extend to prohibit "many troubling, and po-

cause when practices cannot be reasonably characterized as either searches or seizures such that they would normally be evaluated under the Court's Fourth Amendment cases, those practices are deemed to violate the Due Process Clause only if they "shock the conscience" of the Court under *Rochin v California*.[69] Dripps demonstrates that although cases such as *Brown v Mississppi* speak of police conduct as shocking, that case overturned the defendants' convictions under an interpretation of *fundamental fairness*, not mere conscience shocking.[70] After the incorporation turn, the *Rochin* opinion was unmoored from its fundamental fairness foundations. Dripps proposes the development of a due process test to deal with police conduct outside of the traditional Fourth Amendment arena[71]—a task that would, no doubt, be made much easier if there were another thirty years of a robust development of jurisprudence in the area.

In another arena of police conduct, the production of confessions, the lack of a more robust due process jurisprudence also is evident. Beginning with *Brown*, confessions introduced in state criminal trials were governed by due process voluntariness standards grounded in fundamental fairness. *Miranda* changed all of this. Now, instead of a system that trains the attention of courts on the examination of police conduct and the consequent sorting between conduct that is "good" and "bad," *Miranda*'s waiver and invocation system turns the focus of courts toward an assessment of ritual in which suspects sort themselves into groups of those willing to talk to police and those not.[72] Although in theory due process voluntariness remains a viable method of judicial oversight of police interrogation practice, in reality courts do not appear to take this area of law very seriously. There have been extremely few reversals of convictions based on involuntariness by federal courts since *Miranda* was decided.[73] *Miranda*'s approach was

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tentially abusive, police methods").

69 342 US 165, 172 (1952) (holding that pumping of defendant's stomach upon arrest in order to retrieve illegal narcotics "shocks the conscience"). Conduct that has been found not to shock the conscience includes the continual surveillance of a suspect's movements, gaining entrance to a suspect's home in guise of a friend or a lover, and the recording of checks and bank deposits. See Dripps, 1993 U Ill L Rev at 263 (cited in note 68).

70 Dripps, 1993 U Ill L Rev at 269 (cited in note 68).

71 Id at 281 ("[T]his proposed test is broader, in terms and in spirit, than the present Fourth Amendment inquiry into when a reasonable expectation of privacy or a reasonable perception of detention exists.").

72 See William J. Stuntz, Miranda's *Mistake*, 99 Mich L Rev 975, 976–77 (2001) (explaining that whether suspects invoke *Miranda* rights is a signal of savvy and experience, whereby the more experienced suspects end up being free from all police questioning by triggering the appropriate invocation procedure, while less sophisticated suspects receive nearly no protection at all).

73 See Louis Michael Seidman, Brown *and* Miranda, 80 Cal L Rev 673, 745–46 (1992) (arguing that "many lower courts have adopted an attitude toward voluntariness claims that can only be called cavalier").

designed as a solution to the difficulties that courts were having in addressing coerced confessions once a decision was made that some pressure in interrogation was acceptable,[74] but evidence indicating that the *Miranda* approach is not particularly effective is beginning to pile up.[75] Despite the difficulties associated with due process voluntariness, perhaps courts should return to the task of actively reviewing police interrogation tactics. With better evidence in the form of videotaped confessions, for example, courts might be able to do a better job of review than they did in the past.[76] There is a good chance that this approach will better assist vulnerable police suspects, a group that is currently disadvantaged vis-a-vis sophisticated and experienced suspects under the *Miranda* regime.[77] Reasonable people will likely conclude that a procedure that helps the vulnerable is simply more *fair*.

CONCLUSION

The *Gideon* Court had a doctrinal choice to make when it decided to establish the constitutional right of indigent felony defendants to counsel paid for by the state. The Court's first option was to decide that counsel was necessary in order to fulfill the Due Process Clause's guarantee of fundamental fairness under the Fourteenth Amendment. The Court's second option was to decide that the Sixth Amendment guarantee of counsel already provided to federal criminal defendants should be extended to state criminal defendants. The Court preferred the second option, and I have tried to demonstrate in this Essay that it was a choice of consequence. Today's constitutional criminal procedure jurisprudence, located in rigid rules derived from the Bill of Rights, lacks the flexibility of the jurisprudence of the early era. Moreover, today's jurisprudence is much less concerned with public-regarding aspects of justice than the early cases were.

There is one more important consequence of the *Gideon* Court's choice to raise as the end of this Essay draws near. One of the hallmarks of the fundamental fairness cases was the assertion that a legitimate criminal justice system could not be defined solely by reference to truth-seeking values. Instead, the early due process opinions

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74 For a good example of the difficulties courts were facing, consider Justice Frankfurter's plurality opinion in *Culombe v Connecticut*, 367 US 568, 587 (1961) (discussing in detail the "dilemma posed by police interrogation of suspects in custody and the judicial use of interrogated confessions").

75 Dr. Richard Leo, the foremost empiricist in this area, has thoroughly explored *Miranda*'s current impact and found it to be "negligible." Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich L Rev 1000, 1011 (2001).

76 See Stuntz, 99 U Mich L Rev at 999 (cited in note 72) ("Perhaps with better evidence of the kind that videotape offers, the line can be drawn with reasonable accuracy at reasonable cost.").

77 See id at 977.

made clear that non-instrumental values concerned with public justice also should be made paramount. Importantly, the landmark cases such as *Powell* and *Brown* in which the Court intervened in state criminal cases in order to establish these non-instrumental goals were "race cases." In other words, it is simply impossible to understand the foundation of constitutional criminal procedure without understanding that racial inequality played a key role in the Court's decision to intervene in the administration of southern justice.[78] I would go further and say that attention to racial dynamics in these cases was integral to the Court's fundamental fairness determinations. This is not to say that abuse of blacks was irrelevant to the Court in the post-*Gideon* era—quite the contrary. Many of the Court's criminal procedure cases of the 1960s and 1970s arose in the context of the Court's attempt to respond to institutionalized racism.[79] However, during the 1960s and 70s, the period in which the Bill of Rights was made more prominent, the Court rarely acknowledged the racial dimension of the cases in the way the Court had done previously in the fundamental fairness cases. Indeed, the articulation of prophylactic rules left little room for attention to the dynamics of race relations in the criminal justice system. The post-*Gideon* Court fought racism through general constitutional standards that were calculated to constrain racially motivated policies indirectly.[80] This strategy is not surprising, given the political controversy that race-equality cases such as *Brown v Board of Education*[81] and *Baker v Carr*[82] provoked. However, at least one cost of the strategy was that it was no longer necessary for the Court to analyze directly the relationship between institutionalized racism and the fundamental fairness of the criminal justice system in criminal procedure decisions.

An understanding of the relationship between race and the operation of a fair criminal justice system is a critical issue in criminal procedure. The perception that justice is dispensed in a racially unjust manner is one of the major problems facing the modern criminal justice system. Promoting the legitimacy of the criminal justice systems of the various states depends on addressing this problem. I believe that

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78 See Hutchinson, 4 Green Bag 2d at 162 (cited in note 30) (describing a series of Supreme Court opinions "condemning Jim Crow criminal justice" as planting "the seeds of the constitutional revolution"); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich L Rev 48, 49 (2000) (citing "Jim Crow justice" in the South during the 1920s and 1930s as "provid[ing] the occasion for the birth of modern criminal procedure").

79 See Dan M. Kahan and Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 Georgetown L J 1153, 1156–57 (1998) ("Nearly all the landmark criminal procedure cases of the 1960's and early 1970's arose from th[e] context [of institutionalized racism].").

80 See id at 1157–58.

81 347 US 483 (1954).

82 369 US 186 (1962).

the incorporation turn, while admirable in many respects, has led the Court down a blind alley with respect to its ability to deal with race issues. To address these issues forthrightly, the Court must be more sensitive to institutional dynamics and to local and neighborhood culture.[83] More openness to empiricism could also help the Court to assess the fairness or unfairness of particular criminal justice procedures along racial dimensions.[84] And to accommodate the analysis, the Court needs a jurisprudence with flexibility that accommodates the interests of the public. In short, perhaps the Court needs to return to fundamental fairness.

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[83] See Kahan and Meares, 86 Georgetown L J at 1171–85 (cited in note 79) (arguing for the application of a political process theory of judicial review to criminal procedure in order to promote awareness of and respect for local knowledge and norms held by those most affected by criminal procedure).

[84] See generally Tracey L. Meares and Bernard E. Harcourt, *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J Crim L & Criminol 733 (2000).